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START OF COMMENTS

Our Ref. No.: 1-147

October 28, 2002

Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: FCC 02-231 Notice of Proposed Rulemaking in the Matter of
Digital Broadcast Copy Protection

Dear Commissioners:

This constitutes the comments of R. Kunstadt, P.C. on the captioned proposal for digital broadcast copy protection. In particular, these comments are directed to par. 9 of the notice as the comments are directed to the topic of the impact of copy protection on consumers. The comments also relate to par. 8 of the notice, concerning the first amendment. R. Kunstadt, P.C. is an intellectual property firm located in New York, New York. These comments represent the opinion of the firm and the undersigned, but are not presented on behalf of any clients of the firm.

BACKGROUND

These comments were prepared by the undersigned Robert M. Kunstadt. I am a graduate of Yale University and the UCLA School of Law. I studied intellectual property law under the late Professor Mel Nimmer at UCLA. I held a post-graduate research fellowship at the Max Planck Institute for Patent, Copyright and Competition Law in Munich, Germany from 1975 to 1977. In 1978, I commenced work as an associate at the New York office of the IP firm Pennie & Edmonds. I worked at Pennie & Edmonds, in the capacity of associate and subsequently partner, until 1997. In 1997, I established the present firm, R. Kunstadt, P.C. in order to leverage the benefits of new technology to provide prompt and efficient service to intellectual property clients. My National Law Journal article of July 17, 2000 was the first to suggest technological self-help measures as a means for copyright

owners to combat Napster-like piracy. Such measures are proposed to be enacted into law by pending HR 5211 sponsored by Rep. Berman.

THE NEED FOR A FAIR SYSTEM OF COPY PROTECTION

Large-scale copyright owners such as movie studios, record companies and book publishers promote digital copy protection as the key to successful internet sales. Now, TV broadcasters seek digital broadcast TV copy protection. The FCC noticed a proposed rulemaking for such protection on August 9 (FCC No. 02-231). Yet technological copy protection systems have been impotent against efforts of hackers -- most recently, hackers determined that DVD copy protection could be defeated simply by a marker pen. For copy protection to succeed, it needs the force of law behind it, in the form of criminal penalties for anti-protection hacking. For example, the Second Circuit held that it is illegal to post on the internet a method to defeat CD copy protection. *Universal v. Corley*, 273 F.3d 429 (2001).

However, by criminalizing any and all efforts to defeat copy protection, copyright owners' interests would be met but the public interest in fair use of creative works will be stifled. Copyright law would cease to have practical relevance, since whether a copy-protected work really is entitled to copyright protection becomes an academic issue when it is impossible to copy the work due to technological barriers backed by the force of criminal law. Even if Mickey Mouse were held to be in the public domain as a result of the pending Supreme Court case on the issue whether copyright term extensions passed for the mouse's benefit are constitutional, Disney could as a practical matter obtain indefinite protection for Mickey Mouse works by issuing them only in copy-protected formats.

The Supreme Court ruled that non-creative compilation works like telephone directories are not copyrightable. *Feist Publications v. Rural Telephone Service Co.*, 499 US 340 (1991). However, such works if issued in digital form could enjoy an effectively perpetual, patent-like exclusivity by means of technological copy protection. This would create exclusive rights for digital databases of a type that exists in Europe, but has been rejected by the U.S. Congress.

Hence, we need both strong copy protection for works that deserve it, and open public access to works that do not -- so that the public interest in free copying of public domain works is not impeded. To date, this has been considered an impossible contradiction.

However, the contradiction can be resolved if the right kind of copy protection system is enacted. A proper copy protection system should focus only on protection of those works that merit protection. First of all, it should be illegal to copy protect any work that has been rejected for registration by the Copyright Office. While registration is

not a condition of copyright protection, if a work is not important enough to register it is not important enough to benefit from criminally-enforceable copy protection. Requiring the filing of a copyright application as a precondition for copy protection, and its successful issuance as a condition subsequent, would rule out such protection for uncopyrightable works.

Secondly, it should be illegal to copy protect any portion of a work that is not the copyrighted portion. For example, one can issue a new edition of David Copperfield and copyright it as a "derivative work" in which a new introduction and editor's notes are copyrighted, while the original Dickens text remains in the public domain. A proper copyright application must distinguish between the new work and the old. Only the new work should be copy protected by a technological block; the public domain preexisting work would have to be issued in a freely copyable format. Any violation should itself be punishable by law.

Hence, a fair system of copy protection for digital TV broadcasts would not permit any and all broadcasts to be copy protected. Copy protection should be limited to broadcasts for which a copyright application has been filed (except for live broadcasts). If copyright has been rejected, or if it has expired, the subject work should be forbidden by regulation to be broadcast with any copy protection. If part of a work has entered the public domain, that part should not be permitted to be copy protected. The copy protection regulatory scheme should take account of the fact that many works from the early days of film and radio will soon enter the public domain, and as time progresses, so will TV shows from the 20th century. Such works should not be afforded a de facto perpetual copyright by digital broadcast copy protection.

Otherwise, First Amendment rights would be implicated by restraints on speech (i.e., digital storage and retransmission) with respect to works that do not enjoy copyright protection.

By following these principles to fashion digital copy protection system, copyright proprietors can be provided strong copy protection with the force of criminal law, while the public interest in free access to expired copyright material can be safeguarded.

Respectfully submitted,

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END OF COMMENTS
